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Supreme Court, U.S.
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No. 97-527 (2)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1997

DAVID TRIPPETT,

Petitioner,

V

JAMES E. FAGAN

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

BY: RONALD J. BRETZ (P26532)
Associate Professor Thomas M. Cooley Law School
Special Assistant Defender
340 Business & Trade Center
200 Washington Square, North
Lansing, MI 48913
(517) 334-6069

Counsel for Respondent

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Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, JAMES E. FAGAN, asks leave to file the attached Brief in Opposition to a Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The respondent's affidavit in support of this motion is attached hereto. Respondent has been represented by appointed counsel for all post-conviction proceedings. See attached Order.

STATE APPELLATE DEFENDER OFFICE

BY: RONALD J. BRETZ (P26532)
Associate Professor
Thomas M. Cooley Law School
Special Assistant Defender
340 Business & Trade Center
200 Washington Square, North
Lansing, MI 48913
(517) 334-6069
Counsel for Respondent

Date: October 20, 1997

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff–Appellee,

v

JAMES EDWARD FAGAN
(Print the name you were convicted under on this line.)

Defendant–Appellant.

Supreme Court No. _____ (Leave blank.)

Court of Appeals No. _____ (Get this from the Court of Appeals decision or brief.)

Trial Court No. _____ (Get this number from Court of Appeals brief or Presentence Investigation Report.)

AFFIDAVIT OF INDIGENCY

1. My name is JAMES EDWARD FAGAN.
2. I am ~~in prison~~ NOT IN ~~_____~~ (Name of prison) in _____ (City), Michigan.
3. My prison number is N/A.
4. Income and Assets: (Check the ones which apply to you.)

N/A My only source of income is from my prison job.

✓ I have no income.

✓ I have no assets (stocks, bonds, property) which can be quickly changed into cash.

✓ I can not pay the filing fee for the attached application.

I ask this Court to waive the filing fee in this matter. James Edward Fagan

I declare that the statements above are true to the best of my knowledge, information and belief.

Date: 10/14/97 James Edward Fagan
(Sign here)

Subscribed and sworn before me on this 14th day of Oct., 1997. Dallas Lenear JAMES EDWARD FAGAN
(Print name)

Dallas Lenear, Notary Public, Comm. Expires 11/15/2000.

PROOF OF SERVICE

On _____, 19 ____, I mailed by U.S. mail one copy of the documents checked below: (Put a check mark by the ones you mailed.)

___ Affidavit of Indigency and Proof of Service

___ (Delayed) Pro Per Application for Leave to Appeal with a copy of Court of Appeals Decision

___ Court of Appeals Brief

___ Supplemental Court of Appeals Brief

TO: _____ County Prosecutor, at
(Fill in the county where you were convicted.)

_____, _____, MI _____
(Address) (City) (Zip Code)

I declare that the statements above are true to the best of my knowledge, information and belief.

Date: _____

_____
(Sign here)

_____
(Print name)

plsm 6.1.90

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

VS.

JAMES EDWARD FAGAN

Defendant.

JUDGE ROBERT M. RANSOM

DOCKET NO. 86-36977-FC

ORDER APPOINTING COUNSEL

At a session of Court in chambers in Flint.

Whereas the defendant was sentenced on 10/5/88 to:
- (X) a prison term of LIFE to
- ( ) probation
- ( ) other (specify)

After conviction by:
- (X) Trial
- ( ) Plea of Guilty or Nolo Contendre
- ( ) Violation of Probation

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ST APPELLATE
DEF. OFFICE

And defendant having filed a timely petition for appointment of counsel with a showing of financial inability to hire counsel;

IT IS ORDERED that:

Name of Attorney STATE APPELLATE DEFENDER OFFICE
Address 3RD FLOOR, NORTH TOWER, 1200 6TH AVE., DETROIT, MI 48226
Telephone (313) 256-2814

is hereby appointed pursuant to MCR 6.101 (J) (2). The attorney must notify the Genesee County Defender Administrator immediately if he or she cannot or will not accept the appointment.

If the judgment was by plea of guilty or nolo contendre, the court reporter/recorder _____ is ordered to prepare the transcript of the plea and sentence unless a transcript has already been filed.

Transcripts and copies of records cost public money which should not be wasted. The appointed counsel should determine which records and transcripts are necessary and describe the ones requested specifically. The clerk need not comply with a request to duplicate the "entire file" and the reporter/recorder will not comply with a request for transcripts of "all" motions or hearings.

R. M. Ransom
ROBERT M. RANSOM, CIRCUIT JUDGE

DATED: 10-21-88

Prepared by:

Ivor R. Jones (P-15575)
Genesee County Defender Administrator
932 Beach Street
Flint, Michigan 48502

A TRUE COPY
John [illegible] Clerk

No. 97-527

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1997

DAVID TRIPPETT,

Petitioner,

V

JAMES E. FAGAN

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATE APPELLATE DEFENDER OFFICE

BY: RONALD J. BRETZ (P26532)
Associate Professor - Thomas M. Cooley Law School
Special Assistant Defender
340 Business & Trade Center
200 Washington Square, North
Lansing, MI 48913
(517) 334-6069

Counsel for Respondent

COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

I. WHETHER THE FEDERAL DISTRICT COURT PROPERLY GRANTED RESPONDENT'S PETITION FOR HABEAS CORPUS BASED ON A FINDING THAT PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL ADMITTED THAT HE HAD MADE A MISTAKE IN NOT INVESTIGATING AND CHALLENGING EVIDENCE OF DNA TYPING AND WHERE THE UNCHALLENGED AND EXTREMELY DAMAGING DNA EVIDENCE WAS INACCURATELY REPORTED AT TRIAL BY THE PROSECUTOR'S EXPERTS?

II. WHETHER THIS COURT SHOULD DENY CERTIORARI WHERE THE ONLY ARGUMENT RAISED BY PETITIONER WAS NOT RAISED BELOW IN EITHER THE STATE OR FEDERAL COURTS?

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COUNTER STATEMENT OF FACTS

Respondent James Edward Fagan was charged in Genesee County Circuit Court with one count of first degree criminal sexual conduct. On September 8, 1988, on the third day of a jury trial, Mr. Fagan was convicted as charged. On October 1, 1988, Judge Robert M. Ransom sentenced Mr. Fagan to spend the rest of his life in prison.

At trial, the prosecutor intended to call the complainant Tometrick Brown as his first witness. However, she did not appear in court. (R 15; T II 117-118). The trial court issued a bench warrant for the complainant and her mother Betty Brown. (Id., at 192). The following day the prosecutor informed the trial court that the complainant had been arrested and incarcerated in a juvenile facility. (Id., at 197).

The complainant Tometrick Shanel Brown testified that she was 14 years old during June, 1986, and was living with her mother and brother. (R 16; T III 223). In early fall of 1986 she learned that she was pregnant and had an abortion. (Id., at 224). Ms. Brown testified that she had lied when she had previously accused her father James Fagan of having sexual intercourse with her. (Id., at 225). She further testified that she had made up the story about her father because he was always arguing with her mother and, therefore, complainant thought her accusations would end the relationship. (Id., at 229-230, 236).

Ms. Betty Jean Brown testified that she was complainant's mother and had known Respondent James Fagan for about 20 years. (Id., at 199-201). According to Ms. Brown, Mr. Fagan was the father of the complainant. (Id., at 201). In December, 1985, they had separated and Mr. Fagan had moved out of the home. (Id., at 203).

The prosecutor called two employees of Lifecodes Corporation, New York, to testify about a new scientific test which had been used to identify the father of the fetal remains from the complainant's abortion. Mr. Alan M. Giusti testified that he had a Bachelor of Science degree (1982) and had done the laboratory work in this case in June, 1988. (Id., at 128-129). Using blood samples from the complainant, Mr. Fagan, and the fetal remains which had been kept in cold storage, Mr. Giusti performed a variety of tests to isolate and eventually compare genetic material or DNA. (Id., at 129-132). Dr. Kevin McElfresh, Ph.D., testified about his evaluation of the tests performed by Mr. Giusti. (Id., at 157). Dr. McElfresh testified that the paternity index for the North American black population in this case was 2,321,650, or in other words, there was a probability of 99.996% that Mr. Fagan had impregnated the complainant. (Id., at 165, 180).

Respondent James Fagan took the stand in his own defense. Mr. Fagan testified that he moved out of the family home in December, 1985. (Id., at 274). Mr. Fagan denied ever having sexual intercourse with the complainant. (Id., at 276). Mr.

Fagan also testified that he wanted to have the DNA test taken to prove he was not the father and was shocked when the test results were otherwise. (Id., at 277).

Following arguments by counsel and jury instructions, the jury convicted Mr. Fagan of first degree criminal sexual conduct.

Respondent appealed his conviction to the Court of Appeals and on July 28, 1989, filed a brief on appeal and a motion to remand. On September 14, 1989, the Court of Appeals granted the motion to remand on the issue of ineffective assistance of counsel.

At the remand hearing in this case, Respondent presented the testimony of his trial counsel and an expert witness in order to establish that he was denied the effective assistance of counsel at trial. The hearing was held on May 30, 1991, and arguments were held on August 15, 1991. On March 12, 1992, the trial judge, the Honorable Robert M. Ransom, issued an opinion finding that Respondent failed to establish ineffective assistance of counsel and denying Respondent's motion for new trial. (R 25; Opinion of Trial Court attached to Respondent's brief after remand in the Michigan Court of Appeals).

Respondent's theory in this case was that his trial counsel was ineffective in failing to obtain and present an expert witness to independently review and challenge the prosecutor's DNA evidence. As appellate counsel pointed out to the trial judge, Mr. Fagan's conviction was the first criminal case in Michigan based upon DNA typing evidence. As a novel scientific

technique, it was incumbent on trial counsel to challenge its admissibility. (R 21; Remand Hearing 5).

At the hearing, trial counsel James Zimmer testified that he sought out DNA testing prior to trial at the insistence of Respondent Fagan. Mr. Zimmer agreed that the testing be conducted but he did not agree that the results should be admissible at trial. (Id., at 11). Those results were "devastating" to Mr. Fagan's case. (Id., at 12). However, because counsel had stipulated that the tests be conducted, he initially believed that he could not object to the use of the results at trial. Subsequent to the conviction, counsel's research convinced him he had been wrong. (Id). Consequently, prior to sentencing, defense counsel moved for a new trial arguing that the DNA evidence had been improperly admitted. The motion was denied. (R 17; Motion Hearing 10/3/88).

Mr. Zimmer admitted at the hearing that he had not done any research on DNA typing and had not consulted any experts prior to trial. (Id., at 14-15). He further admitted that his failure to investigate and challenge the DNA evidence was not related to trial strategy. (Id., at 15-16). Mr. Zimmer acknowledged that he had "absolutely" made a mistake in not challenging the evidence. (Id., at 16).

Dr. Julian Adams, a professor of biology at the University of Michigan, testified for the defense as an expert in population genetics, paternity testing, and the statistical analyses related to these fields. Dr. Adams testified that he had reviewed all of

the records in this case from the Lifecodes Corporation and the testimony of the Lifecodes experts from Respondent's trial. (Id., at 23). These experts testified at trial that they had analyzed the DNA tests of Respondent Fagan, the complainant Tometrick Brown and the remains of her aborted fetus to determine if it was possible that Respondent Fagan could have impregnated the complainant. Dr. Adams explained that Lifecodes estimated the genetic makeup of the three samples and put the numbers in a computer which then calculated the frequency of occurrence of these types in the random population. In this case, Lifecodes determined that there was a one in 13,000 chance that a randomly selected person could have the genetic makeup necessary to have fathered the fetus. (Id., at 26). Respondent Fagan's genetic makeup was such that he was included as a possible father.

Dr. Adams testified that Lifecodes then computed a probability of paternity of Respondent Fagan based upon this one in 13,000 paternity index. (Id., at 28-29). The probability that Respondent Fagan was the father of Tometrick Brown's aborted fetus was, according to Lifecodes experts, 99.996%. (Id., at 32). Dr. Adams explained that in calculating the probability of paternity, the analyst begins with a prior probability that is actually a prior assumption. In paternity cases, the analyst makes a prior assumption that the probability of paternity is 50% and then, using the DNA results and population frequencies, adjusts that figure upwards. In the instant case, the 99.996%

probability of paternity was arrived at in this way. (Id., at 27-32).

Although Dr. Adams had no criticisms of the manner in which Lifecodes conducted the DNA typing in this case, he strongly disagreed with their conclusion. According to Dr. Adams, Lifecodes based its calculations on the population at large chosen randomly. Figures based on random population statistics assume that there is no possibility that any male relatives of the accused would have been involved. Since relatives are known to share some genes, probability of paternity computations based on random population statistics are not valid if the accused has male relatives who could be the father and who have not been explicitly excluded. (Id., at 33-35).

In the instant case, Dr. Adams found that Lifecodes failed to take into consideration that the alleged victim shared a bedroom with her teenage brother during the period of conception. Because the brother had access to his sister during this time and because the brother was the natural child of Respondent Fagan, the paternity analyst had to either exclude the brother via DNA testing or factor the brother into the computation of paternity probability. (Id., at 37, 60). Since there was no indication that Lifecodes had excluded the brother, the calculations presented at Respondent's trial were "meaningless". (Id., at 38).

Dr. Adams recalculated Respondent's probability of paternity factoring in the brother. Dr. Adams concluded that the

probability of paternity was closer to 87%. (Id., at 41). While he acknowledged that this figure seemed high, any figure less than 95% is considered inconclusive in the field of paternity testing. (Id., at 40).

On cross-examination, the prosecutor asked Dr. Adams if his position on the necessity of excluding immediate family members was widely held. Dr. Adams responded that it was not a matter of opinion:

> "I don't think it's a matter of opinion. I think it's -- I think everyone would agree with you -- excuse me -- will agree with me that -- that when you calculate probabilities of paternity you have to factor out relatives. If there are relatives involved, it makes these complexions meaningless." (Id., at 52).

Dr. Adams also stated that the obvious thing to do is to test the male relatives to see if they can be excluded. (Id., at 53). If there is no possibility that Respondent's son is the father, then he can be ruled out and Lifecodes calculations would be correct. (Id., at 57). The computations are not appropriate where the analyst has failed to exclude or factor in male relatives of the accused who have been known to have access to the mother. (Id., at 60).

At the conclusion of Dr. Adams' testimony, the defense rested. The prosecutor requested a continuance to obtain a witness. (Id., at 64). When the proceedings reconvened on August 15, 1991, the prosecutor chose not to present any testimony. The court heard arguments and seven months later issued a seven-page opinion denying Respondent's motion for new trial. (1a-18a).

Respondent subsequently filed a brief after remand in the Michigan Court of Appeals and argued this case orally in that Court on November 9, 1993. (R 25). On February 24, 1994, the Court of Appeals issued an opinion affirming Respondent's conviction and remanding for resentencing. (9a-14a). Respondent filed a motion for rehearing which was denied on April 25, 1994. (15a). On May 6, 1994, Respondent filed an application for leave to appeal to the Michigan Supreme Court. (R 26). That Court denied the application on December 20, 1994. Justice Levin would have remanded the case to the Court of Appeals for consideration of issues not addressed in that Court's opinion of February 24, 1994. (16a).

On March 14, 1995, Respondent filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. (R 1). On May 30, 1996, District Judge Horace W. Gilmore issued an order granting the petition finding that Respondent's trial counsel's performance was deficient due to his admitted failure to obtain an expert to review and challenge the DNA paternity evidence. Judge Gilmore further found that because an expert would have effectively reduced the probative value of that evidence from conclusive to inconclusive proof of paternity and because that evidence was the only direct proof of guilt, there was a reasonable probability that, absent trial counsel's error, the jury may have had a reasonable doubt about Respondent's guilt. (17a-27a).

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's grant of habeas relief in a memorandum opinion. (28a).

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY CERTIORARI WHERE THE DISTRICT COURT AND UNITED STATES COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHERE TRIAL COUNSEL ADMITTED THAT HE HAD MADE A MISTAKE IN NOT INVESTIGATING AND CHALLENGING EVIDENCE BASED ON DNA TYPING AND WHERE COUNSEL'S FAILURE RESULTED IN RESPONDENT'S CONVICTION FOR CRIMINAL SEXUAL CONDUCT SUPPORTED ONLY BY MISLEADING AND INACCURATE EXPERT TESTIMONY.

Petitioner Trippett has petitioned this Court for a writ of certiorari based on an argument that Petitioner has not previously advanced. The essence of Petitioner's new argument is that the District Court misunderstood the legal meaning of the term "access" as used by Respondent's expert witness, and that as a result, both the District Court and the Court of Appeals erred in finding that Respondent was denied his Sixth Amendment right to the effective assistance of counsel.

For the reasons stated infra, this Court should not consider Petitioner's arguments. Moreover, Petitioner's argument is without legal merit. The essence of Respondent's claim below was not based on the legal definition of the term "access" if there even is such an accepted definition. Respondent's claim is and has been based on the unrebutted expert testimony he presented at the post-conviction hearing in state court. Respondent has consistently argued in both the state and federal courts that counsel was ineffective for failing to investigate the extremely incriminating DNA evidence and the resultant probability of paternity calculation.

The record in this case establishes that the only evidence supporting respondent's conviction for criminal sexual conduct was the DNA evidence and the state's experts' conclusion that the probability that Respondent had impregnated the complainant was 99.996%. Respondent established at the post-conviction hearing ordered by the Michigan Court of Appeals that this "probability of paternity" percentage as reported to his jury was inaccurate as it grossly overstated that possibility of Respondent's guilt. Respondent also established that if his trial counsel had conducted a reasonable investigation into the then-novel DNA evidence and paternity calculations, counsel could have easily established the error in the state's experts' conclusions. Finally, Respondent established that if counsel had presented readily available expert testimony, it would have effectively destroyed the only evidence of guilt and Respondent would likely have been acquitted.

The unrebutted facts as proven by Respondent at the hearing and as accepted by the District Court and the Sixth Circuit Court of Appeals clearly satisfy Respondent's burden under Strickland v Washington, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). This Court in Strickland laid out a two-pronged test for a defendant to establish a claim of ineffective assistance of counsel:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the

> defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland v Washington, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

The first prong of the test requires the defendant to show counsel's deficient performance under an objective standard by identifying specific acts or omissions which were not the product of "reasonable professional judgment." Strickland, at 690. Proof of this first prong must be sufficient to overcome the "presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id., at 689 (citation omitted).

Petitioner Trippett argues that trial counsel's failure to conduct any investigation of the DNA evidence and probability calculations was not deficient. According to Petitioner's reasoning, the testimony of Dr. Adams, Respondent's expert at the post-conviction hearing, was "without legal significance" (Petition for Writ of Certiorari, at 27). However, under the first prong, this Court must only decide if counsel's inaction was appropriate and reasonable. Under any standard, counsel's performance was grossly inadequate.

At the hearing, trial counsel acknowledged that his performance was deficient and that it was not due to any trial strategy, reasonable or otherwise. Moreover, as appellate counsel pointed out to the trial court, Mr. Fagan's conviction was, according to a federal report, the first in Michigan to be obtained through the use of DNA typing evidence. US Congress

Office of Technology Assessment, Genetic Witness: Forensic Uses of DNA Tests, July, 1990, at 164. It must be considered to be deficient performance where an attorney permits his client to be convicted solely on the basis of an unchallenged novel scientific technique that has never been offered before in the courts of this state. The law gives a criminal defendant the means to object to this type of evidence and to force the prosecutor to prove its reliability prior to its admission. Frye v United States, 293 F 1013 (DC Cir, 1923); People v Young, 418 Mich 1; 340 NW2d 805 (1983). Moreover, the law permits a criminal defendant to examine all evidence the prosecutor intends to use and to obtain the assistance of an expert witness at state expense if necessary. Ake v Oklahoma, 470 US 68; 105 S Ct 1087; 84 L Ed 2d 53 (1985). For defense counsel to fail to investigate the only incriminating evidence through readily available procedures in a case such as this must be deemed per se deficient. See e.g. Sims v Livesay, 970 F2d 1575 (CA 6, 1992); United States v Fessel, 531 F2d 1275 (CA 5, 1976); William v Martin, 618 F2d 1021 (CA 4, 1980).

The District Court and Court of Appeals agreed with trial counsel that his failure to conduct any investigation into the DNA was not objectively reasonable. Despite Petitioner's arguments to the contrary, this Court must affirm this conclusion.

Petitioner's real argument seems to be with the District Court's finding on the second prong of the Strickland test which

requires Respondent to show that defense counsel's deficient performance prejudiced the defense. To satisfy this requirement, Respondent must prove that "there is a reasonable probability that absent the errors, the fact-finder would have had a reasonable doubt respecting guilt." Strickland, at 695.

As noted, Petitioner argues that there was no prejudice to Respondent because Respondent's failure to allege or prove a sexual relationship between Respondent's son and the alleged victim somehow undermined Dr. Adams' testimony. This is simply incorrect. Dr. Adams testified that his statistical conclusions were based on the fact that the son was a male relative of Respondent's, that he shared a bedroom with the alleged victim during the period of conception, and that he had not been scientifically excluded. Neither Dr. Adams nor any other witness testified that the son must first be shown to have had a sexual relationship with the alleged victim. Indeed, Dr. Adams was well aware at the time of his testimony that no such relationship had been alleged.

Petitioner relies solely on a 1938 decision of the Oklahoma Supreme Court which indicates that the term access within the paternity context means actual sexual intercourse and not merely proximity. Jackson v Jackson, 76 P.2d 1062 (Okl, 1938). Initially, it is important to understand that the court in Jackson did not decide the precise issue presented here. Instead, that court was deciding the proper quantum of proof necessary to show paternity; "access" (read intercourse) between

the husband and wife during the period of conception can be seen as conclusive proof of paternity. Thus, the Jackson court was properly deciding a question of law which required the court to give the term access a legal meaning.

The issue presented in Respondent Fagan's case is markedly different. First, the legal posture is distinguishable. This case is not about the legal level of proof necessary to find conclusive proof of paternity. The issue in the instant case concerns the ability of a criminal defendant to present expert testimony in his own defense and defense counsel's responsibility to present that evidence. The holding of the Oklahoma court is simply not applicable in this context.

"Access" as used by Dr. Adams in this case is not dependent on a legal meaning assigned by the Oklahoma Supreme Court in 1938. Instead it is the scientific meaning of the term as it is used by experts in the field of population genetics and paternity testing. Dr. Adams, an expert qualified in the field of population genetics and paternity testing, testified at the post-conviction hearing that his recalculated and inconclusive probability of paternity statistic was based upon standard scientific principles. The Lifecodes probability calculation was scientifically unsound because Lifecodes failed to exclude or factor in a male relative of the alleged father (Respondent) who was known to have had access to the mother. Since Respondent's son had not been excluded through genetic testing, Dr. Adams took the only scientifically appropriate step that Lifecodes did not

take: he recalculated the probability by factoring the son into the figures.

What Petitioner has failed to take notice of is that Dr. Adams testified that his recalculated and inconclusive probability of paternity statistic was based upon **standard scientific principles**. In response to a question from the prosecutor as to whether this was merely his opinion, Dr. Adams testified that it was not a matter of opinion. He stated that all analysts would agree that when one calculates probabilities of paternity, one has to factor out relatives. If there are relatives involved, the probabilities are meaningless unless this step is taken. Thus, the Lifecodes' probability calculation was scientifically unsound. Since Respondent's son had not been excluded through genetic testing, Dr. Adams took the only scientifically appropriate step that Lifecodes did not take: he recalculated the probability by factoring the son into the figures.

Tellingly, the prosecutor at the conclusion of Dr. Adams testimony asked the trial court for a continuance to obtain a rebuttal witness. Even though the court granted the motion, the prosecutor was unable to present such a witness. It can be inferred from this failure that nothing in Dr. Adams' testimony could reasonably be rebutted by any other expert. Nevertheless, it remains a matter of record that the testimony was not rebutted and the only testimony in this case regarding the accuracy of Lifecodes' 99.996% probability of paternity in light of the

victim's brother's access to the victim during the period of conception is that of Dr. Adams.

As a direct result of defense counsel's failure to challenge the Lifecodes conclusions, the jury was told that there was a 99.996% probability that Respondent was guilty. In other words, the jury was told that according to unrebutted scientific calculations, there was no doubt at all, let alone a reasonable doubt, concerning Respondent's guilt. Not surprisingly, despite the alleged victim's recantation, the jury very quickly convicted Respondent as charged. The plain injustice here is that the only evidence of guilt, this beyond-any-doubt probability of guilt calculation, was wrong and the jury was never informed of that fact.

According to Dr. Adams, based on all of the known facts of this case and on the DNA typing, the probability of guilt was around 86.8%. The difference between these two figures is a reasonable doubt, a doubt that Respondent was deprived of presenting to the jury as a direct result of his trial counsel's admitted negligence. It is inconceivable that any court would find that it would not have been important and necessary to present Dr. Adams' testimony to the jury. Nevertheless, Petitioner herein makes the remarkable claim that Dr. Adams recalculated and inconclusive probability of paternity figure would not have been admissible at trial. (Id, at 28).

Petitioner can cite no law for his proposition that a criminal defendant can be prohibited from presenting qualified

and irrebuttable expert testimony which directly disproves the prosecutor's only evidence of guilt. Instead, the Petitioner argues that respondent's son cannot be factored into the paternity calculations absent competent evidence of sexual intercourse between the siblings. Not only is this claim directly contrary to the only expert testimony offered at the post-conviction hearing, it also seriously undermines the use of the paternity calculations against Respondent at trial. As explained fully in the Counterstatement of Facts, supra, the prosecution at Respondent's trial did not offer **any** evidence of sexual intercourse between Respondent and his daughter. Yet the prosecution was allowed to present evidence of paternity based solely on the paternity index and probability calculation. According to the Petitioner-prosecutor's argument in this Court, the state's only evidence of Respondent's guilt was not admissible in this case because there was no competent evidence of intercourse between the two. Petitioner cannot have it both ways. The grant of habeas relief by the District Court and the affirmance of that decision by the Court of Appeals were proper and in accordance with this Court's precedents. This Court should deny the petition for writ of certiorari.

II. THIS COURT SHOULD DENY CERTIORARI WHERE THE ONLY ARGUMENT RAISED BY PETITIONER WAS NOT RAISED BELOW IN EITHER THE STATE OR FEDERAL COURTS.

Petitioner is arguing in this Court that the District Court erred in granting habeas relief and the Sixth Circuit Court of Appeals erred in affirming that decision. Petitioner argues that trial counsel was not ineffective for failing to investigate and challenge the DNA evidence and paternity calculations. The essence of Petitioner's argument is that the testimony of Respondent's expert witness given at the post-conviction hearing which effectively challenged the state's only evidence of guilt would not have been admissible at trial due to the lack of evidence of sexual intercourse between the alleged victim and her teenage brother. As detailed by Respondent in Issue I, supra, Petitioner's argument in this regard is legally and scientifically incorrect and should be disregarded by this Court.

This Court should also disregard Petitioner's argument because it has never been previously raised by Petitioner Trippett in the federal courts or by the Genesee County Prosecutor in the state courts. It is disingenuous for Petitioner to argue that the District Court and the Sixth Circuit Court of Appeals erred where the argument which allegedly establishes the error was not made in those courts.

This Court has held that arguments made for the first time in the Supreme Court will ordinarily not be considered by this Court. United States v New York Telephone Co., 362 US 638; 66 S Ct 393; 90 L Ed 371 (1946). For example, in United States v

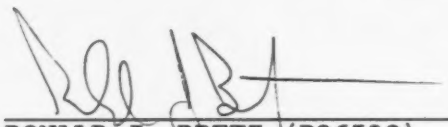
Estate of Donnelly, 397 US 286; 90 S Ct 1033, 1038; 25 L Ed 2d 312 (1969), this Court refused to consider additional defenses to a foreclosure suit brought by the government because the defenses had not been considered by either the District Court or the Court of Appeals. As this Court stated in Duignan v United States, 274 US 195, 200; 47 S Ct 566, 568; 71 L Ed 996 (1927): "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed on below are reviewed."

In the instant case, the precise claim of error advanced by Petitioner has not been presented to any of the five courts who have previously heard this case. Moreover, Petitioner has not presented any reasons why this case should be an exception to the general rule. Thus, this Court should refuse to consider Petitioner's argument and deny the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,



RONALD J. BRETZ (P26532)
Associate Professor
Thomas M. Cooley Law School
Special Assistant Defender
State Appellate Defender Office
340 Business & Trade Center
200 Washington Square, North
Lansing, MI 48913

Counsel for Respondent

Date: October 20, 1997

No. 97-527

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1997

DAVID TRIPPETT,

Petitioner,

V

JAMES E. FAGAN

Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

JEAN M. DOWNEY, being first sworn, says that on October 20, 1997, she mailed to this Court the following: MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, AFFIDAVIT, BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, PROOF OF SERVICE, and she mailed one copy of same to:

GENESEE COUNTY PROSECUTOR
Courthouse
900 S. Saginaw St.
Flint, MI 48502

Jean M. Downey
JEAN M. DOWNEY

Subscribed and sworn to before me
October 20, 1997.

Tricia Ann McNabb
TRICIA ANN McNABB
Notary Public, Ingham County, Michigan
My commission expires: 6/18/2000
IDEN NO. 5711t / Ronald J. Bretz/Lyle N. Marshall

STATE APPELLATE DEFENDER
LANSING OFFICE
340 Business & Trade Center
200 Washington Square, North
Lansing, Michigan 48913-0001
Phone: (517) 334-6069
Fax: (517) 334-6987

JAMES R. NEUHARD
STATE APPELLATE DEFENDER

NORRIS J. THOMAS, JR.
CHIEF DEPUTY DEFENDER, DETROIT

DAWN VAN HOEK
LEGAL RESOURCES DIRECTOR, DETROIT

F. MARTIN TIEBER
DEPUTY DEFENDER
DIRECTOR, LANSING OFFICE

SHEILA ROBERTSON DEMING
SPECIAL UNIT DIRECTOR

October 20, 1997

Clerk of the Court
United States Supreme Court
Washington, D.C. 20543

Re: Trippett v Fagan
United States Supreme Court No. 97-527

Dear Clerk:

Enclosed please find the original and nine (9) copies of:

1) Motion to Proceed in Forma Pauperis
2) Affidavit in Support of Motion to Proceed in Forma Pauperis
3) Brief in Opposition to Petition For Writ of Certiorari
4) Proof of Service

in the above-titled cause which I ask that you file in your Court.

Thank you for your cooperation.

Sincerely,

RONALD J. BRETZ
Special Assistant Defender

RB.jd

Enclosures

cc: Genesee County Prosecutor
James Fagan

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.